No. 15943

IN THE

United States
Circuit Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA,
Appellant,

vs.

RICHARD HAROLD HANSEN,
Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA

BRIEF OF APPELLANT

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STATUTES AND CASES CITED

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OPINION BELOW

The Order of the District Court dismissing the indictment (R. 6-17) is officially reported at 158 F. Supp. 883.

JURISDICTION

The District Court had jurisdiction of the alleged offense by virtue of the provisions of Title 50, U.S.C. App. §462, and Title 18, U.S.C. §3231.

The jurisdiction of this Court rests in §3731, Title 18, U.S.C. which provides that the Courts of Appeals shall have jurisdiction of an appeal from a decision or judg-

ment dismissing an indictment, except where a direct appeal to the Supreme Court of the United States is authorized.

STATEMENT OF THE CASE

This is an appeal from an order dismissing an indictment made and entered by the United States District Court for the District of Montana, Butte Division, on February 7, 1958. The Honorable W. D. Murray was the presiding Judge.

The indictment, returned on June 7, 1957, charged that the Appellee, Richard Harold Hansen, a registrant under the Universal Military Training and Service Act, who had been classified 1-A-0, pursuant to the rules and regulations promulgated under said Act, was notified to report for induction into the Armed Forces of the United States on January 31, 1957, and that on February 1, 1957, said Appellee did knowingly fail, neglect and refuse to perform a duty required of him under said Act, in that he knowingly failed, neglected and refused to be inducted into the Armed Forces of the United States of America, as so notified and ordered.

On January 16, 1958, Appellee filed a motion to dismiss the indictment, alleging that the indictment (1) failed to state an offense against the United States, (2) showed on its face that the Appellee was classified 1-A-0 and as such is exempt from induction into the Armed Forces, but must be assigned to non-combatant duty, (3) showed that the defendant performed all the duties he was required to perform under the Universal Military

Training and Service Act. This motion was argued on January 16, 1958, and taken under advisement by the Court. On February 7, 1958, the Court granted defendant's motion and ordered the indictment dismissed.

The question thus presented is whether an indictment for failure to report for induction which alleges a failure to comply with an induction order to a conscientious objector, classified 1-A-0, to report for "induction into the armed forces of the United States" is sufficient.

SPECIFICATION OF ERROR

The District Court erred in dismissing the indictment returned against the Appellee.

ARGUMENT

The Indictment Was Sufficient And Should Not Have Been Dismissed

In ordering the indictment dismissed, the District Court held that " 'induction into the armed forces of the United States' means something different than 'induction into the armed forces of the United States for assignment to non-combatant service only.' " (R. 10.) It further held that by virtue of his classification of 1-A-0, the Appellee was under the duty of submitting to induction into the Armed Forces for non-combatant service only, so that in refusing to submit to the order which required him to report for "induction into the armed forces of the United States of America" the appellee was not violating any duty imposed by law. The Court held the indictment was insufficient since it charged Appellee with failing to perform a duty which under the law he did not owe. (R. 16.)

The District Court distinguished the case of *Shaddy* v. *United States,* 139 F. (2d) 754, (R. 13), which the Government contended would have sustained the indictment in this case, primarily on the language of 50 U.S.C. App. §454(a), which was not contained in the law at the time of the *Shaddy* decision. The Court relied upon the following language of §454(a):

> "Every person inducted into the Armed Forces pursuant to the authority of this subsection after the date of the enactment of the 1951 amendments to the Universal Military Training and Service Act [June 19, 1951] shall, following his induction be given full and adequate military training for service in the armed force into which he is inducted for a period of not less than four months. * * *"

The Court held that under this provision everyone inducted was subject to military training. (R. 11.) It is to be noted that there are excepted from §454(a) requirement of military training, certain persons, including conscientious objectors. The first sentence of §454(a) specifically provides: "Except as otherwise provided in this Title [§§451-454 and §§455-471 of this Appendix] * * *." §456 of Title 50, U.S.C. provides in subsection (j) for exemption from military training of conscientious objectors. This subsection provides in part:

> *"Nothing contained in this title* [sections 451-454 and 455-471 of this Appendix] *shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who by reason of religious training and belief, is conscientiously opposed to participation in war in any form.* * * * Any person claiming exemption from combatant training and service because of such con-

scientious objections whose claim is sustained by the local board shall, *if he is inducted into the armed forces* under this title [said sections] *be assigned to non-combatant service* as defined by the President, * * *" (Emphasis supplied.)

It is the contention of the Government that subsection (j) of 50 U.S.C. App. §456 is one of the exceptions provided by subsection (a) of 50 U.S.C. App., §454, and that when §454(a) and §456(j) are read together, the ground upon which the District Court based its order dismissing this indictment is eliminated.

Neither the Universal Military Training and Service Act nor the regulations promulgated thereunder make any provision for a qualified induction into the Armed Forces. 50 U.S.C. App. §456(j) provides, in the case of conscientious objectors, for induction into the Armed Forces, and a subsequent assignment to non-combatant duties. Even in this instance the language of the Act distinguishes between induction and assignment.

The Appellee and the Court below have failed to distinguish between the order directing Appellee to report for induction, and the purpose of his induction. Induction is an unqulaified action through which each person selected for service and training under the Act is received into the armed forces. According to the Act, the obligation to report for induction devolves upon each selectee. The Act additionally provides, out of deference to the religious beliefs of those conscientiously opposed to combatant training for participation in war, that such persons shall be assigned to non-combatant service. The language of §456(j) contemplates, however, that induction will

precede such assignment[1]. There is no limitation concerning the assignment of selectees classified 1-A while those classified 1-A-0 can only be assigned in accordance with the provisions of 50 U.S.C. App. §456(j).

It is apparent that while assignment is a necessary step in the process of training and service under the Universal Military Training Act, it is separate and distinct from induction. Thus, while a person classified 1-A-0 must be assigned to non-combatant service in accordance with the language of the Act, it is not necessary for the induction order to specify this assignment. According to the Act and the regulations promulgated thereunder, a selectee, even though classified 1-A-0 is adequately advised of his duty to report by an order to report for induction into the Armed Forces of the United States.

Since an induction order need not specify the assignment that the selectee is to receive, the order in question imposed a duty upon Appellee to report for induction, and in willfully failing and refusing to do so he was in violation of Title 50 U.S.C. App. §462, consequently the indictment charging him with violating that section was proper and should not have been dismissed.

It is to be presumed that the military authorities will follow the law and assign the Appellee to non-combatant service. He cannot disobey a lawful order for induction merely upon the conjecture that the military would violate the law.

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[1] §454(a) also speaks of induction as a prerequisite for assignment, as follows: "* * * persons inducted into the Armed Forces for training and service * * * shall be assigned to stations or units of such forces * * *."

The Appellee, and every other selectee classified 1-A-0, while not entitled to have his assignment spelled out in his induction order is protected to the extent that a habeas corpus proceeding may be brought in the event that he is assigned to any but non-combatant service. *Weidman* v. *Sweeney,* 117 F. Supp. 739 (D.C.E.D.Pa). Although the Courts cannot direct that an individual be given a particular military assignment, a Court can order that a petition for habeas corpus be granted unless the military authorities refrain from acts in excess of their jurisdiction over the applicant for the writ. *LaRose* v. *Young,* 139 F. Supp. 516 (D.C.N.D.Calif.); *Nelson v. Peckham,* 210 F. (2d) 574 (C.A.4).

For the reasons stated it is submitted that the induction order was sufficient and that the indictment should not have been dismissed.

It is respectfully submitted that the judgment of the District Court should be reversed.

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